IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

**No. 73-1200**

COMMONWEALTH OF PENNSYLVANIA and PENNSYLVANIA PUBLIC UTILITY COMMISSION,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA, *et al.*,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF FOR LEHIGH COAL & NAVIGATION COMPANY (LC & N) IN OPPOSITION

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### Questions Presented

1. Whether judicial review of an ICC order authorizing abandonment of certain lines and operations subject to the imposition of traffic protective conditions includ-

ing tariffs, should be instituted in the district court exercising bankruptcy jurisdiction over a railroad in reorganization or in a three-judge district court in another district under the Urgent Deficiencies Act, 28 U.S.C. §2321 et seq.?

2. Whether a District Court may in the exercise of its bankruptcy jurisdiction refuse leave to review such orders of the ICC by a three-judge district court in another district in order to protect its own jurisdiction and to prevent collateral attack on the District Court's Order after the time for appeal therefrom had elapsed?

## Statutory Provisions Involved

Section 1(18-20) of the Interstate Commerce Act 49 USC 1 (18)—(20): Section 77(o) of the Bankruptcy Act 11 USC 205(o): Section 1336 (a), (b) and (c) of the Judicial Code, 28 U.S.C. 1336 (a), (b) and (c): Section 1398 (a), (b) of the Judicial Code, 28 U.S.C. 1398 (a) and (b), are set forth at this respondent's appendix below (RA1 to RA4).

## Counter-Statement of the Case

Central Railroad Co. of New Jersey ("CNJ") filed its petition for reorganization in the U. S. District Court for the District of New Jersey in March, 1967. The present Trustee was appointed in January, 1971 at a time when the railroad was facing a severe liquidity crisis which threatened to cause a shutdown of all its operations. The State of New Jersey for some years had provided some form of passenger and freight service subsidies; the Commonwealth of Pennsylvania ("Commonwealth") had no present or prospective plans for assist-

ance to CNJ, although CNJ operated some 131 miles of lines in Pennsylvania known as the Lehigh & Susquehanna system ("L&S"), which CNJ had leased from Lehigh Coal & Navigation Co. ("LC&N").

To deal with the crisis the Trustee obtained a grant of $2,000,000 from the State of New Jersey and authority from the Court and Federal agencies to issue up to $2,500,000 in federally-guaranteed Trustee certificates under the Emergency Rail Service Act of 1970, Pub. L. 91-663, 84 Stat. 1975. The Trustee also embarked on a program called "The Blueprint for Survival" designed to permit the CNJ to continue as a viable railroad on a restructured basis. This program included, among other things, the abandonment of all CNJ operations in Pennsylvania and the assumption of such operations by the Lehigh Valley Railroad ("LVRR") which operated lines in Pennsylvania parallel to and in some instances on joint trackage with the L&S. To implement the Blueprint, the Trustee applied to the Reorganization Court for permission under §77(o) of the Bankruptcy Act, 11 U.S.C. 205(o), to file an application with the ICC for approval and authorization of the abandonment of the entire L&S system as well as some small segments of lines in New Jersey. By Order No. 410 entered on May 25, 1971 the Reorganization Court authorized the Trustee to file with the ICC an application to abandon the aforesaid lines and operations. By Order No. 410 the Court reserved jurisdiction of the subject matter and directed the Trustee to apply further to the Court for authority to abandon any lines or operation that may be authorized to be abandoned by the ICC.

The ICC divided the Trustee's application to abandon into 29 parts and in August, 1971 the ICC approved the abandonment of 10 segments, five in New Jersey and five in Pennsylvania. The main part of the L&S system

was left untouched. On December 20, 1971 the Reorganization Court entered Order No. 445 directing the Trustee to temporarily suspend on April 1, 1972 all operations of the Debtor in Pennsylvania and to cease all operations of the Debtor if the ICC denied the Trustee's application to abandon operation of the L&S. This order also enjoined all parties from instituting or maintaining in any other Court any action affecting the Debtor's operations in Pennsylvania. On January 11, 1972 the Reorganization Court entered Order No. 451 authorizing the Trustee to abandon the 10 segments as approved by the ICC. Appeals by the Commonwealth of Pennsylvania and others from these two orders were affirmed *per curiam* by the Court of Appeals in March, 1972. *In the Matter of Central Railroad Company of New Jersey, Debtor*, 455 F. 2d 988, 989, 990 (3rd Cir. 1972). A petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit filed on behalf of the Commonwealth of Pennsylvania and the Pennsylvania Public Utility Commission as to Orders Nos. 445 and 451 was denied on October 10, 1972. *Commonwealth of Pa. et al. v. U. S.* (No. 71-1596), 409 U. S. 894, 34 L. Ed. 2d 151, 93 S. Ct. 113. One of the questions presented in said petition, by the same Petitioners as herein, was whether a review of the decision of the ICC allowing the abandonment of the 10 segments must be in a three-judge statutory court, under the Urgent Deficiencies Act, 28 U.S.C. 2321-2325, or whether the ICC decision must be reviewed either by or upon consent of the Reorganization Court in the railroad reorganization proceeding. The present petition presents the same question again.

On April 1, 1972 the Trustee ceased all operations of the L&S and the Lehigh Valley took over such operations pursuant to ICC service orders. From April 1,

1972 to the present time LVRR has been providing service on the L&S, originally by virtue of the aforesaid service orders, and later pursuant to an agreement between LVRR and LC&N approved by the LVRR Reorganization Court. On May 26, 1972 (service date, June 2, 1972) the ICC authorized the Trustee to abandon the L&S on certain conditions* which the Reorganization Court authorized the Trustee to accept and to abandon the L&S by its order No. 514 issuing on July 5, 1972. Petitioners at no time appealed from Order No. 514 or applied for a stay. Instead, on December 11, 1972 long after the time for appeal expired therefrom, they sought leave to appeal from the aforesail ICC order bearing service date June 2, 1972 to a three-judge statutory Court in the Middle District Court of Pennsylvania. The Reorganization Court denied leave (A-9a) and the Court of Appeals affirmed (A-1a to 8a). This is the first order Petitioners seek to review.

On December 11, 1972 the Reorganization Court also heard the application of LC&N requiring the Trustee to consummate a settlement claimed by the Trustee to be conditioned upon the finality of the ICC order authorizing the abandonment of the L&S. On April 4, 1973 the Reorganization Court decided that "the time to appeal has long since expired and Pennsylvania should not now be heard to complain about the ICC order of June 2, 1972 or of this Court's Order No. 514 entered July 5, 1972 . . ." (A-14a). The Court issued Order No. 583 directing the Trustee to consummate the LC&N settlement (A-15a) and the Court of Appeals affirmed (A-11a) on the basis of the opinion rendered in connection with

* Central R. Co. of N. J.—Abandonment, 342 ICC 227 (1972); on August 23, 1972 (service date Sept. 11, 1972) the ICC denied petitioners' petition for reconsideration.

the appeal from Order No. 550, *In The Matter of the Central Railroad Company of New Jersey*, No. 73-1110 (3rd Cir. Sept. 20, 1973) (A-11a). This is the second order Petitioners seek to review.

## ARGUMENT

1. The instant case does not involve the abandonment of railroad service to the public on the L&S. The present controversy had its origin in a contest between Reading Railroad (in reorganization), the nominee of petitioners, and LVRR (in reorganization) to furnish service on the L&S when the CNJ ceased operations thereon. The ICC selected LVRR which has been rendering service on the L&S to the present time. The Reading has since the rejection of its application by the ICC, lost interest in the furnishing of substitute service. All this was part of the record in the District Court and the Court of Appeals.

2. In their prior petition for certiorari relating to Orders Nos. 445 and 451 (No. 71-1596) the petitioners presented the very same question they now present in the instant Petition.

We adopt and incorporate herein as to the District Court Orders Nos. 550 and 583 what was stated in the brief for the United States at pp. 5-7 in opposition to the prior petition dealing with Orders Nos. 445 and 451:

> "The district court's orders were a proper exercise of its bankruptcy jurisdiction. The petition presents no question warranting further review.
>
> Contrary to petitioners' contention, a reorganization court has jurisdiction to review Interstate Commerce Commission orders deciding abandonment ap-

plications filed by the trustee, and the court, to protect its review jurisdiction, may enjoin the parties from seeking review of such orders in another forum. See *New Haven Inclusion Cases*, 399 U. S. 392; *Chicago & North Western Ry. Co.* v. *United States*, 52 F. Supp. 65 (N. D. Ill.), affirmed *per curiam*, 320 U. S. 718. To permit appeal from the Commission's orders to be taken to a district court unfamiliar with the reorganization would result in confusion, unnecessary expense, and excessive delay, the very evils which Congress has sought to eliminate in railroad reorganizations. As this Court noted in *New Haven Inclusion Cases, supra*, at 421:

> "• • • the Commission was required to certify its proposal to the court as a prerequisite to judicial approval. § 77(d), 11 U.S.C. § 205(d). Injunctive intervention by the three-judge court would thus have disrupted an essential statutory phase of the New Haven reorganization.'

Here, as in *New Haven Inclusion Cases*, the variety of issues and parties raises the possibility of multiple litigation in several district courts unless primacy is accorded a single forum. See 399 U. S., at 418-419 n. 50. See also *In re Penn Central Transportation Co.*, 329 F. Supp. 387, 390 (E. D. Pa.), affirmed, 446 F. 2d 1109 (C. A. 3). Moreover, confining review to the reorganization court should not affect the outcome of the litigation: since Section 77(o) of the Bankruptcy Act incorporates Section 1(18) of the Interstate Commerce Act, the question of public convenience and necessity may be reviewed by the reorganization court, and such a court would exercise the same scope of review as a three-judge court.

> The power of a bankruptcy court to enjoin parties from litigation which would hamper exercise of its statutory responsibility or would otherwise interfere with exercise of its jurisdiction over the debtor is well established. 11 U.S.C. 11(a)(15). See *Continental Illinois National Bank* v. *Chicago, R.I. & Pac. R. Co.*, 294 U. S. 648, 675. See generally, 1 Collier, *Bankruptcy*, para. 2.60-2.62. Any delay engendered here by intrusion into the review process by a three-judge court unfamiliar with the C.N.J. reorganization might seriously hamper the reorganization court in exercising its statutory responsibility. The district court was therefore justified in restraining the litigants from proceeding in some other forum."

3. Petitioners concede that §§1336 and 1398, 28 U.S.C. 1336 and 1398, confer exclusive jurisdiction on the District Court making a referral to the ICC to review the resulting ICC order (Pet. p. 8). Petitioners question, however, whether Order No. 410 authorizing the Trustee to file applications with the ICC for permission to abandon certain lines operated by the Trustee which included the L&S, is such a referral. By Order No. 410 the Court not only authorized the Trustee to file applications for abandonment with the ICC, but also reserved jurisdiction of the subject matter and directed the Trustee to apply further to the Court for authority to abandon any lines or operations that may be authorized to be abandoned by the ICC (A-5a Footnote 6). A clearer case of "referral" cannot be found. Moreover, the District Court regarded the abandonment of the L&S as "effected pursuant to §77(o) of the Bankruptcy Act" (A-13a). The Court of Appeals also considered the abandonment authorized by the ICC to be the result of a referral by the District Court under §77(o) (A-5a Foot-

note 6). Petitioners do not agree with the findings made by the Court of Appeals and the District Court that Order No. 410 constituted a 77(o) referral to the ICC. This is a question of fact hardly deserving the attention of this Court.

Indeed, §77(o) requires that abandonments be referred to the ICC "when required by the Interstate Commerce Act"; the District Court's Order No. 410 conformed to the requirements of that Section. Section 77(o) further provides that the Trustee shall take all proceedings necessary for the consummation of any such abandonment in accordance with the order of the Judge and that "any such order of the Judge shall be a final order". Hence, the Court of Appeals was correct in the case at bar when it stated:

> "The wording and legislative history of 28 U.S.C. §§1336(b) and 1398(b), as well as of §77(o) of the Bankruptcy Act 11 U.S.C. §205(o), show that Congress intended appeals of abandonment orders in railroad reorganization cases to be reviewed in the context of the reorganization proceedings and not in a court of coordinate jurisdiction. See *Leonard Bros. Trucking Co.* v. *United States*, 301 F. Supp. 893, 898 (S. D. Fla. 1969); *House Report* 1015, 88th Cong. 2d Sess., to accompany H.R. 7508 . . ." (A-6a Footnote 6)

Petitioners' contention at p. 7 that it has been the settled practice to institute actions in three-judge courts to review ICC abandonment Orders is without merit in view of the provisions of §§1336(b) and 1398(b). These Sections were enacted in 1964 (Pub. L. 88-513, §1, 78 Stat. 695 and Pub. L. 88-513, §2, 78 Stat. 695) and render obsolete the older cases cited by petitioners such as *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134 (1946).

Congress' purpose in enacting these provisions was explicitly to keep Commission matters within the control of the referring court. Congress felt that the history of the prior act demonstrated both that the expertise of the referring court was being frustrated and that unnecessary delay was being tolerated in courts which lacked the referring court's sense of urgency. See 1964 U.S. Code Cong. and Adm. News, p. 3235 for the legislative history; see also *Leonard Bros. Trucking Co.* v. *U. S.*, 301 F. Supp. 893 (S. D. Fla. 1969); *H. Messick, Inc.* v. *Baggett Transportation Co.*, 268 F. Supp. 459 (W. D. Mo. 1967).

4. The Petitioners have failed to take an appeal from Order No. 514 entered July 5, 1972 which authorized the Trustee to abandon the L&S and accept the ICC conditions involving traffic protective conditions including tariffs. The time for such appeal has long ago expired. Petitioners seek to excuse such failure by pointing to their interim efforts to obtain reconsideration from the ICC of the L&S abandonment order of May 26, 1972 (service date June 2, 1972). This effort terminated on August 23, 1972 (service date September 11, 1972) when their petition for reconsideration was denied. They offer no excuse for their failure to seek to have the District Court stay its hand pending reconsideration by the ICC. Had petitioners sought a stay from the District Court there would have been no conflict (as to which they now complain) between "the agency's procedure regarding petitions for reconsideration" and the "reorganization procedures"; nor did Petitioners appeal from Order No. 514 and urge the grounds they now urge. They should not be permitted to do indirectly via a petition for the writ which they have been barred for a long time from doing directly.

5. Petitioners' contentions (Pet. 10) that in affirming Order No. 550 the Court of Appeals relied on its 1972 recision affirming Order No. 445 authorizing temporary suspension of operations in Pennsylvania and that the 1972 decision has been overruled by the *en banc* decision in *In re Central Railroad Company of New Jersey*, 485 Fed. 2d 208 ignores the record in the Court of Appeals in the instant case. The record in the Court of Appeals shows that on the appeal from Order No. 550, LC&N urged that the affirmance of Order No. 445 by the Court of Appeals in March 1972 *In the Matter of the Central Railroad Company of New Jersey, debtor* and related cases 455 F. 2d 988, 989, 990 compelled an affirmance by that Court in the instant case of Order No. 550 under the doctrines of law of the case and res judicata. The Court of Appeals, however, declined to decide the issue on these grounds and stated that the *rationale* for its affirmance of No. 550 made it unnecessary for it to determine whether the doctrines of law of the case and res judicata controlled (A-5a Footnote 5). The basis for its decision was 28 U.S.C. §§1336(b), 1398(b) and §77(o) as well as the cases cited at A-5a and A-6a and in Footnote 6.

In making the aforesaid contention Petitioners also ignore the plain language of the *en banc* decision. The *en banc* Court did not expressly or impliedly overrule the 1972 decision. On the contrary, it refused to apply the 1972 decision because it was distinguishable from the case then before it. 485 F. 2d 208 at 211. It noted that the 1972 decision authorized suspension of service pending ICC action on CNJ's application for abandonment which action was unduly delayed. It also noted that in the case before it no application for approval of suspension of service had been filed with the ICC or with any state regulatory agency.

Moreover, in the 1972 case there was implied approval by the ICC of the suspension of operations of the L&S by CNJ in the form of the ICC service order authorizing LVRR to take over operations of the L&S immediately upon the suspension of service by the CNJ. There was no such takeover of service or any application pending therefor with the ICC or any other agency in the *en banc* case.

But above and beyond everything else the Court had before it in the instant case the fact that the ICC had finally approved the abandonment of the L&S by the CNJ and the permanent assumption of CNJ operations of the L&S by LVRR and that this approval was the basis for the entry of Order No. 514 on July 5, 1972 from which Petitioners took no appeal or attempted to stay but instead resorted to a series of applications, of which the case at bar is only one, designed to prevent this chapter in the history of the CNJ from being brought to a close. *In re Huntington & Broad Top Mt. R. R. & Coal Co.*, 213 F. 2d 411 (3rd Cir. 1954)—a fact not lost on the Court of Appeals, as its opinion indicates A-3a to A-6a.

## CONCLUSION

**For the foregoing reasons the petition for a writ of certiorari should be denied.**

Respectfully submitted,

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February, 1974.

# APPENDIX R

**Section 1(18)-1(20) of the Interstate Commerce Act, 49 U.S.C. 1(18)-1(20):**

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall

cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commissioner shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the

provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

**Section 77(o) of the Bankruptcy Act, 11 U.S.C. 205(o):**

(o) The trustee or trustees, from time to time, shall determine what lines or portions of lines of railroad and what other property of the debtor, if any, should be abandoned or sold during the pendency of the proceedings in the interest of the debtor's estate and of ultimate reorganization but without unduly or adversely affecting the public interest, and shall present to the judge petitions, in which other parties in interest may join, for authority to abandon or to sell any such property; and upon order of the judge made after a hearing pursuant to such reasonable notice by publication or otherwise as the judge may direct to parties in interest, authorizing any such abandonment or sale, but only with the approval and authorization of the Commission when required by the Interstate Commerce Act as amended February 28, 1920, or as it may be hereafter amended, the trustee or trustees shall take all steps and carry out all proceedings necessary for the consummation of any such abandonment or sale in accordance with the order of the judge. Any such order of the judge shall be a final order for the purposes of appeal. The judge may order and decree any sale of property, whether or not incident to an abandonment, under this subsection at public or private sale and subject to or free from liens. The proceeds derived from any such sales shall be received by the trustee or trustees subject, in case the property was sold free from lien, to any liens thereon at the time of sale,

and shall be applied or disposed of in such manner as the judge by further order shall direct. The expense of such sale shall be borne in such manner as the judge may determine to be equitable. The judge may order the trustee or trustees of the debtor to deposit such proceeds with any mortgage trustee entitled thereto, to be applied in payment of all or part of such mortgage.

**§ 1336. Interstate Commerce Commission's orders**

(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.

(b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

(c) Any action brought under subsection (b) of this section shall be filed within 90 days from the date that the order of the Interstate Commerce Commission becomes final. As amended Aug. 30, 1964, Pub.L. 88-513, § 1, 78 Stat. 695.

**§ 1398. Interstate Commerce Commission's orders**

(a) Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall

be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

(b) A civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, an order of the Interstate Commerce Commission made pursuant to the referral of a question or issue by a district court or by the Court of Claims, shall be brought only in the court which referred the question or issue. As amended Aug. 30, 1964, Pub.L. 88-513, § 2, 78 Stat. 695.